PENINSULA EDUCATION (SETIA ALAM) SDN BHD
v. BIAXIS (M) SDN BHD (IN LIQUIDATION)

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZIMAH OMAR JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: B-02(IM)(C)-1834-11-2023]
5 AUGUST 2024

Abstract – *(i) Under the doctrine of separability governing arbitration agreements, the arbitration agreement has a life of its own and survives the challenges made to the contract on grounds of fraud, duress and even illegality unless the matter is not arbitrable on the ground of public policy of the State. Therefore, even though a winding-up of a company has the effect of terminating agreements which the liquidator may not want to affirm and continue with, the arbitration agreement would survive such a termination; (ii) Liquidation does not change the mode of resolving a dispute, whether it is via a pre-agreed arbitration or absent that, litigation in court. Neither is liquidation opposed to arbitration for arbitration is nothing more than a way of determining if liability is established arising from a matter the subject of the arbitration agreement and if so, what is the quantum when damages are being assessed.*

ARBITRATION: *Arbitration agreement – Arbitration clause – Operation of – Contractor company went into liquidation – Employer terminated employment of contractor – Contractor commenced suit to claim for payments due from employer – Employer applied under s. 10 of Arbitration Act 2005 for stay of court proceedings pending reference to arbitration – Whether arbitration agreement became inoperative with liquidation – Whether arbitration agreement remained intact and subsisting – Whether liquidation altered pre-agreed mode of resolving parties' disputes via arbitration – Whether issues that arose for arbitral tribunal to decide – Whether arbitration agreement valid and enforceable – Doctrine of separability – Applicability*

ARBITRATION: *Stay of proceedings – Application for – Application for stay of court proceedings pending reference to arbitration under s. 10 of Arbitration Act 2005 – Contractor company went into liquidation – Employer terminated employment of contractor – Contractor commenced suit to claim for payments due from employer – Whether arbitration agreement became inoperative with liquidation – Whether arbitration agreement remained intact and subsisting – Whether liquidation altered pre-agreed mode of resolving parties' disputes via arbitration – Whether issues that arose for arbitral tribunal to decide – Whether arbitration agreement valid and enforceable – Whether court could intervene in matters covered by arbitration agreement – Doctrine of separability – Applicability*

The plaintiff, a contractor, appointed under a PAM Contract 2007 (With Quantities) ('PAM Contract') had gone into liquidation. The defendant ('employer') thus terminated the employment of the contractor. The contractor commenced a suit in the High Court to claim for the amount due under some interim payment certificates. The employer disputed the claim and applied under s. 10 of the Arbitration Act 2005 ('AA') for a stay of the court proceedings pending reference to arbitration as there was a valid arbitration agreement in the PAM Contract that the parties had entered into. The argument against the stay became more novel when the liquidator for the contractor in liquidation contended that the arbitration agreement had become inoperative with the liquidation and that the high costs and expenses in arbitration would justify the court refusing a stay in preference to a less expensive method of resolving disputes having regard to the cash flow problem of the contractor. The contractor further argued that the winding up of a company was an action *in rem* and that the insolvency regime would prevail over arbitration as the insolvency regime seeks to address the rights and obligations of the company in liquidation *vis-a-vis* all creditors and not just the employer and that the employer was an unsecured creditor like most creditors in the chain of construction contracts. The employer, on the other hand, argued that the arbitration agreement remained intact and subsisting and the liquidation did not alter the pre-agreed mode of resolving the parties' disputes *via* arbitration. The arbitration agreement, it was argued, was valid and enforceable as the termination of the employment of the contractor in this case, did not affect the pre-existing rights and obligations of the parties before the termination and these were enforceable *via* the arbitration agreement which was a term of the contract. The employer further argued that the court could not rewrite the contract for the contractor on the ground that it was more expedient, efficient and economical to proceed with litigation considering the financial straits the contractor found itself to be in, having gone into liquidation. The employer also submitted that the present dispute had not ventured into the territory reserved for the insolvency courts. The High Court found much justification for concluding that a liquidation rendered the arbitration agreement 'inoperative' and did not grant a stay of the court proceedings after considering the prohibitive costs of arbitration that a company in liquidation would have to surmount, thus not justifying a stay of the court proceedings. The High Court therefore dismissed the s. 10 of the AA application. Aggrieved, the employer appealed to the Court of Appeal. The issues that arose were: (i) whether the liquidation of the contractor rendered the arbitration agreement 'inoperative' having regard to the acute factor of costs and efficiency in resolving the matter; (ii) whether the insolvency regime took precedence over the arbitration agreement such that all disputes must now be resolved in the courts and more so when there was allegedly no dispute in the debt claimed; (iii) whether there were issues pending which require resolution by an insolvency court as these were

non-arbitrable; and (iv) whether in spite of the arbitration agreement, the court may have regard to prohibitive costs of arbitration in refusing a stay under s. 10 of the AA when the party suing was in liquidation.

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Under the doctrine of separability governing arbitration agreements, the arbitration agreement has a life of its own and survives the challenges made to the contract on grounds of fraud, duress and even illegality unless the matter is not arbitrable on the ground of public policy of the State. Therefore, even though a winding-up of a company has the effect of terminating agreements which the liquidator may not want to affirm and continue with, the arbitration agreement would survive such a termination. (para 20)

(2) Whilst the liquidator was not a party to the arbitration agreement, yet when he commenced any action on behalf of the contractor in liquidation, he stepped into the shoes of the company in liquidation and was bound by the terms of the PAM Contract including the arbitration agreement unless the liquidator applied to the court to disclaim from being bound by those terms. Such dispute remained very much resolvable through arbitration as the parties had agreed to this mode of resolving their disputes with the advantages of party autonomy, confidentiality, speed and finality. The court should not rewrite the arbitration agreement for the parties when they had freely and voluntarily agreed to it when they entered into an industry-based standard-form contract in the PAM Contract. As the arbitration was under the auspices of PAM, the arbitrator chosen would at least have the basic requirements of familiarity with the PAM Contract and the rough and tumble of the construction works either with respect to the rights and obligations of the contractor or employer, both during the employment of the contractor and the termination of the employment. (paras 30 & 31)

(3) As the PAM Contract here had been terminated by the event of liquidation of the contractor, there was no obligation of the parties that would need to be rescinded by an application to the court. Even if one considered the arbitration agreement as a burden to be disclaimed, that would have to be by way of a separate leave application to the court. The employer by its s. 10 of the AA application was certainly not exercising its right under s. 531(6) of the Companies Act 2016. The arbitration agreement survived the liquidation of the company that was a party to the agreement under the doctrine of separability which is housed in s. 18(1) and (2) of the AA. Clause 25.3 of the PAM Contract is not read as saying that upon the contractor becoming insolvent or be wound up, the arbitration agreement becomes inoperative. It is the

employment of the contractor that 'shall forthwith automatically determined (*sic*)' and even if the substantive contract has been terminated, there are rights and obligations that are preserved upon termination for how else would a contractor claim for work done and seek a release of retention sum and correspondingly an employer claim for damages for failure to complete the project and for defects in the work done. The arbitration agreement had not become 'inoperative' upon the contractor going into liquidation on the ground that the fees for arbitration would be beyond the reach of the contractor in liquidation or that there would be unnecessary delay caused by the matter going forward to arbitration. (paras 34-40)

(4) The contractor had already been wound up by another creditor and it was now, through its liquidator, bringing a claim for what it alleged to be payments due to it from work done by it for the employer. If there was an arbitration agreement, then this court could not ignore its terms, and that would include the terms of the arbitration agreement which survived the termination of the PAM Contract. It was thus not a question of whether because of the liquidation of a party to an arbitration agreement, a new paradigm has set in to render 'inoperative' the arbitration agreement. The mandatory language of s. 10 of the AA is such that the court cannot disregard the terms of the arbitration agreement just because one of the parties to it is in liquidation. The fact that the debt was not admitted was sufficient for it to come within the meaning of 'a matter which is the subject of an arbitration agreement' for reference to arbitration. (paras 46-48)

(5) Liquidation does not change the mode of resolving a dispute, whether it is *via* a pre-agreed arbitration or absent that, litigation in court. Neither is liquidation opposed to arbitration for arbitration is nothing more than a way of determining if liability was established arising from a matter the subject of the arbitration agreement and if so what was the quantum when damages were being assessed. The contractor was already in liquidation and it was not a case where it was seeking to wind up the employer for what it perceived to be a debt not disputed on substantial ground for work done. However, the principle of the court granting a stay of its proceedings in favour of arbitration applied equally across the board even when the claimant was already in liquidation and was claiming a disputed debt in litigation and not arbitration. Its liquidation had not changed an iota of its initial agreement to arbitrate. (paras 60 & 61)

(6) The parties were still at the very preliminary stage of the contractor having filed its claim in court and the employer, upon entering appearance, had applied for a stay of the court's proceedings on the ground of a valid arbitration agreement which was not null and void, inoperative or incapable of performance. In brief, both parties were at

the stage of setting forth their claims against each other. The issue was purely on whether there were monies owing by the employer to the contractor under the PAM Contract and if so, what was the amount. These were not issues peculiarly within the province of a winding-up court but rather issues for the arbitral tribunal to decide. There were no issues that have encroached onto the winding-up court for its decision, be it the issue of whether if a set-off was raised by the employer, should it be allowed to reduce the contractor's claim accordingly or whether the amount owing by the contractor to the employer should be treated as unsecured and falling into the general pool of unsecured creditors to be distributed *pari passu*. As and when these issues have to be decided, the arbitral tribunal should be able to decide as matters falling within the terms of reference to arbitration. (paras 70-73)

(7) A tabulation of the initial costs of arbitration as opposed to the costs of litigation was made. Whilst the initial costs may appear higher, it must not be forgotten that there was still the element of legal fees and disbursements not costed in. Parties could always explore with the arbitrator to be appointed by PAM, if parties could not agree on the arbitrator to be appointed by PAM, on chess clock arbitration or documents only arbitration so as to reduce costs. It was not enough for the liquidator to say that the arbitration process would be slow and expensive, draining away the limited funds and/or assets of the company and holding up distributions to creditors in the liquidation proceedings which would compromise the orderly and efficiency of the liquidation process and/or insolvency regime. The PAM Contract with its arbitration clause had been around for quite a while and no parties could claim that they were unaware of the costs of arbitration. The benefits of party autonomy, confidentiality, speed and finality would be what parties generally subscribe to when they agree to arbitrate rather than litigate. The court could not rewrite the terms of the contract in the arbitration agreement for the parties. In fact, the court could not intervene in matters covered by an arbitration agreement unless expressly provided for under the AA. (paras 77-83)

(8) Thus, the arbitration agreement in the PAM Contract did not automatically become 'inoperative' upon the contractor going into liquidation. The debt claimed was disputed and the conduct of the liquidator all point to the fact that the arbitration agreement was very much enforceable as the liquidator had not applied to court for any of the contractor's rights, obligations or burdens to be disclaimed. The doctrine of separability applied and the arbitration agreement was very much alive and applicable. The dispute was a contractual dispute which was arbitrable and not an insolvency dispute of the kind which was not arbitrable and which was within the distinct domain of the winding-up

court. This court would lean on upholding the bargain of the parties especially in the arbitration agreement which was part of an industry based standard form contract in the PAM Contract. (paras 84-86)

Case(s) referred to:

Arch Reinsurance Ltd v. Akcay Holdings Sdn Bhd [2019] 1 CLJ 305 FC ***(refd)***
Celcom (Malaysia) Sdn Bhd v. Sarawak Electricity Supply Corporation [2003] 1 CLJ 6 CA ***(refd)***
Che Group Bhd v. Dato' Kweh Team Aik [2019] CLJU 1292; [2019] 1 LNS 1292 HC ***(refd)***
CMS Energy Sdn Bhd v. Poscon Corp [2008] CLJU 543; [2008] 1 LNS 543 HC ***(refd)***
FamilyMart China Holding Co Ltd v. Ting Chuan Holding Corporation [2023] UKPC 33 ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***
KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd [2013] 1 CLJ 993 HC ***(dist)***
Larsen Oil & Gas Pte Ltd v. Petroprod Ltd [2011] SGCA 21 ***(refd)***
Peace River Hydro Partners v. Petrowest Corp [2022] SC No 41 ***(refd)***
Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***
Prince George (City) v. McEelhanney Engineering Services Ltd [1995] CLJ No 1474 ***(refd)***
Rightmove Sdn Bhd v. YWP Construction Sdn Bhd & Anor [2014] CLJU 233; [2014] 1 LNS 233 HC ***(refd)***
Sian Participation Corp (In Liquidation) (Appellant) v. Halimeda International Ltd (Respondent) (Virgin Islands) [2024] UKPC 16 ***(refd)***
Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301 FC ***(refd)***
Tomolugen Holdings Ltd And Another v. Silica Investors Ltd And Other Appeals [2015] SGCA 57 ***(refd)***
UDA Land Sdn Bhd v. Puncak Sepakat Sdn Bhd [2020] CLJU 877; [2020] 1 LNS 877 HC ***(refd)***
Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd [2014] 4 CLJ 895 HC ***(refd)***

Legislation referred to:

Arbitration (Amendment) Act 2011, s. 10(1)(b)
Arbitration Act 1952 (repealed), s. 6
Arbitration Act 2005, ss. 4, 8, 10(1), 18(1), (2)
Companies Act 1965 (repealed), s. 226(3)
Companies Act 2016, ss. 471(1), (2), 517, 531(1)(c), (6), Twelfth Schedule

Arbitration Act 1996 [UK], s. 9
Companies Act 1985 [UK], s. 618

Other source(s) referred to:

MJ Mustill & SC Boyd, *The Law and Practice Of Commercial Arbitration In England,* 2nd edn, London, Butterworths, (1989), pp 464, 465

For the appellant - Ng Si Hui, Lee Wei Ting & Loh Chu Bian; M/s Loh Ivan & Lee Hui
For the respondent - Harjinder Singh, Samantha Sam & Teo Yu Jen; M/s Prem & Assocs

[Editor's note: For the High Court judgment, please see Biaxis (M) Sdn Bhd (In Liquidation) v. Peninsula Education (Setia Alam) Sdn Bhd [2023] CLJU 2700; [2023] 1 LNS 2700 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JCA:

[1] The narrative of this case was rather predictable. A contractor appointed under a PAM contract had gone into liquidation. The employer thus terminated the employment of the contractor. The contractor commenced a suit in the High Court to claim for an amount due under some interim payment certificates. The employer disputed the claim and applied under s. 10 of the Arbitration Act 2005 ("AA 2005") for a stay of the court proceedings pending reference to arbitration as there was a valid arbitration agreement in the PAM Contract 2007 (With Quantities) ("PAM Contract") that the parties had entered into.

[2] The argument against the stay became more novel when the liquidator for the contractor in liquidation contended that the arbitration agreement had become inoperative with the liquidation and that the high costs and expenses in arbitration would justify the court refusing a stay in preference to a less expensive method of resolving disputes having regard to the cash flow problem of the contractor.

[3] Some cases from other jurisdictions like the UK, Canada and Singapore were cited as support for the proposition that upon liquidation, a liquidator is entitled to treat an arbitration agreement as being inoperative and to fall back on the default mode of resolving disputes *via* a court action.

[4] The contractor further argued that winding-up of a company is an action *in rem* and that the insolvency regime would prevail over arbitration as the insolvency regime seeks to address the rights and obligations of the company in liquidation *vis-a-vis* all creditors and not just the employer and that the employer is an unsecured creditor like most creditors in the chain of construction contracts.

[5] The employer on the other hand argued that the arbitration agreement remains intact and subsisting and the liquidation does not alter the pre-agreed mode of resolving the parties' disputes *via* arbitration. The arbitration agreement, it was argued, is valid and enforceable as the termination of the employment of the contractor in this case, does not affect the pre-existing rights and obligations of the parties before the termination and these are enforceable *via* the arbitration agreement which is a term of the contract.

[6] The employer further argued that the court cannot rewrite the contract for the contractor on the grounds that it is more expedient, efficient and economical to proceed with litigation considering the financial straits the contractor found itself to be in, having gone into liquidation.

[7] The employer highlighted the fact that whilst there may be matters best left to a winding-up court to decide, especially in the area of disputes over preferential treatment of debts or the nature of the sums retained with respect to whether there was a trust, by and large, the present dispute has not ventured into that territory reserved for the insolvency courts. For the present moment, the parties are at the stage of disputing the amount owing by or to the other in a context where some work had been done by the contractor and employment having been terminated by the employer, the additional sum incurred in getting a rescue contractor to complete the works and the usual issues of defects and delays, if any.

At The High Court

[8] The High Court found much justification for concluding that a liquidation renders the arbitration agreement "inoperative" in its reading of the cases cited from other jurisdictions. It was further enamoured not to grant a stay of the court proceedings after considering the prohibitive costs of arbitration that a company in liquidation would have to surmount, thus not justifying a stay of the court proceedings.

[9] The High Court therefore dismissed the s. 10 of the AA stay application. Aggrieved by the decision, the employer as appellant here had appealed to the Court of Appeal. The parties shall be referred to as the contractor or plaintiff and the employer as the defendant.

[10] The contractor is Biaxis (M) Sdn Bhd (in liquidation) and the employer is Peninsula Education (Setia Alam) Sdn Bhd. The contract in question is the PAM Contract 2007 (With Quantities) ("the PAM Contract") following a letter of award dated 28 April 2016 with respect to a construction project ("the project"). The arbitration agreement is housed in cl. 34.5 of the PAM contract, which provided that in the event of any disputes or differences between the employer and the contractor, the matter shall be referred to arbitration.

At The Court Of Appeal

[11] The issues before us are as follows:

(i) whether the liquidation of the contractor renders the arbitration agreement "inoperative" having regard to the acute factor of costs and efficiency in resolving the matter;

(ii) whether the insolvency regime takes precedence over the arbitration agreement such that all disputes must now be resolved in the courts and more so when there is allegedly no dispute in the debt claimed;

(iii) whether there are issues pending which require resolution by an insolvency court ("insolvency issues") as these are non-arbitrable;

(iv) whether in spite of the arbitration agreement, the court may have regard to prohibitive costs of arbitration in refusing a stay under s. 10 of the AA when the party suing is in liquidation.

The Law On A Stay Of Court Proceedings Under Section 10 Of The AA

[12] When there is a valid arbitration agreement with respect to a matter, and a party to it proceeds with a claim in court against the other party, the latter may apply for a stay of the court proceedings before taking any other steps in the proceedings and for a reference of the matter to arbitration.

[13] To resist such an application, the claimant in court must show that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 10 of the AA under which the defendant had applied for the stay of the court proceedings reads as follows:

> **10. Arbitration agreement and substantive claim before court.**
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> (1) A court before which proceedings are brought in respect of a matter which is the subject of an **arbitration agreement shall,** where a party makes an application before taking any other steps in the proceedings, **stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed;**
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> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.
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> (emphasis added)

[14] The court may also exercise its inherent powers not to grant a stay of the court proceedings if there are related court proceedings involving non-parties to the arbitration agreement where there is a real risk of different decisions being rendered arising out of the same matter or that otherwise public policy and interest weigh against staying the court proceedings.

[15] Here, it is not disputed that the employer in the High Court had not taken any other steps in the proceedings other than the permitted step of entering an appearance. There was also no issue that there was an arbitration agreement wide enough to cover the typical matters that would be within the scope of reference to arbitration as contained in cl. 34.5 of the PAM Contract as follows:

> In the event that any dispute or differences arises between the Employer and Contractor either during the progress or after completion or abandonment of the Works regarding:
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> 34.5(a) any matter or whatsoever nature arising under or in connection with the Contract;

34.5(b) any matter left by the Contract to the discretion of the Architect;

34.5(c) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to;

34.5(d) the rights and liabilities of the parties under Clause 25.0, 26.0, 31.0 or 32.0; or

34.5(e) the unreasonable withholding of consent or agreement by the Employer or Contractor,

Then such disputes shall be referred to arbitration.

[16] The issue is only with respect to whether the contractor as the plaintiff had proved on the balance of probabilities that the arbitration agreement has become "inoperative" in the circumstances of the case because of its liquidation.

Whether The Liquidation Of The Contractor Renders The Arbitration Agreement "Inoperative" Having Regard To The Acute Factor Of Costs And Efficiency In Resolving The Matter

[17] On 20 April 2022, the contractor was wound up and one Dato' Dr Shanmughanathan a/l Vellanthurai was appointed as the liquidator ("the liquidator"). The contractor (with the liquidator acting in its name) commenced a suit on 3 March 2023 against the employer to claim an outstanding sum of RM13,100,556.25 under the project. In response, the employer applied on 11 April 2023 for a stay of court proceedings under s. 10 of the AA.

[18] The learned Judicial Commissioner ("JC"), in dismissing the said application on 24 October 2023, had at para. [27] of her grounds of judgment ("GOJ") relied on the Canadian Supreme Court case of *Peace River Hydro Partners v. Petrowest Corp* [2022] SC No 41 ("*Peace River*") that a party in liquidation is subject to insolvency protection and with that, the arbitration agreement had become inoperative. In light of the company's insolvency, and having regard to the potential increase in costs and delay in time, the High Court refused a stay of the court proceedings in favour of arbitration. The learned JC said that to allow recourse to arbitration would be to prejudice the interests of the creditors and shareholders of the wound-up company.

[19] With the greatest of respect, we are afraid that the learned JC may have misread the proposition of law in *Peace River* case (*supra*) as stating that upon a party being wound up, the arbitration agreement becomes "inoperative."

[20] Under the doctrine of separability governing arbitration agreements, the arbitration agreement has a life of its own and survives the challenges made to the contract on the grounds of fraud, duress and even illegality unless the matter is not arbitrable on the grounds of public policy of the State.

Therefore, even though a winding-up of a company has the effect of terminating agreements, which the liquidator may not want to affirm and continue with, the arbitration agreement would survive such a termination.

[21] The context of the *Peace River* case (*supra*) was one where Petrowest Corp (in receivership) and its various affiliates had sued Peace River for subcontracting work done and Peace River applied for a stay of the court proceedings on the grounds that there was a valid arbitration agreement, which the court should enforce and refer the matter to arbitration. The basic premise is that an arbitration agreement entered into before the receivership or insolvency of one party is still valid and enforceable when receivership or insolvency sets in and the Canadian Supreme Court was careful in explaining its stand and the position of the law in its judgment as highlighted below:

> 6 … *Permitting a court-appointed receiver to avoid arbitration on the basis that it is not a party to the debtor's pre-existing agreement to arbitrate is inconsistent with a proper reading of s. 15, ordinary principles of contract law, party autonomy, and this Court's long standing jurisprudence with respect to arbitration.* Nor can disclaimer or the doctrine of separability permit receivers to unilaterally render otherwise valid arbitration agreements "inoperative" or "incapable of being performed" within the meaning of s. 15. Only a court can make a finding that an arbitration agreement is inoperative or incapable of being performed.
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> *8. To be clear, the fact that a party has entered receivership or insolvency proceedings or is financially impecunious is not, on its own, a sufficient basis for a court to find an arbitration agreement inoperative.*
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> 72. In many cases, the shared interests in expediency, procedural flexibility, and specialised expertise will converge through arbitration. In such a scenario, *the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings.* In other words, the court should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve … (emphasis added)

[22] The Supreme Court was at pains to explain that it nevertheless, based on the special facts and circumstances of the case, concluded in para. [129] that the arbitration agreement had been rendered "inoperative where arbitration would compromise the orderly and efficient resolution of a receivership."

[23] It would thus appear that the Supreme Court of Canada had, in the special circumstances of the case, held on policy grounds that to enforce the arbitration agreement would compromise the orderly and efficient resolution

of the receivership as there were multiple arbitration agreements and the wording of each of the arbitration agreement differs. Each arbitration agreement applies to different set of disputes and provides for different arbitration procedures as observed in para. 13 of its judgment.

[24] There were also purchase orders which do not contain arbitration clauses as stated in para. 13 of its judgment and understandably to refer the matter to arbitration, the receiver will have to participate and fund at least four different arbitrations involving seven different sets of counterparties and this would also involve entity which is not subject to any of the arbitration agreements. The Supreme Court observed as follows in paras. 173 to 176:

> 173. I conclude that the Receiver has established that the Arbitration Agreements are inoperative. Stated differently, *the arbitral processes contemplated in the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership,* contrary to the objectives of the BIA. Further, while recognizing the importance of party autonomy and freedom of contract, referral to arbitration in the unique circumstances of this case would jeopardize the Receiver's ability to maximize recovery for the creditors and to allow Petrowest and the Petrowest Affiliates to move forward with certainty. This conclusion is based on the following factors.
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> (a) Effect of Arbitration on the Integrity of the Insolvency Proceedings
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> 174. *The inexpediency of the multiple overlapping arbitral proceedings contemplated in the Arbitration Agreements, as compared to a single judicial process, is the determinative factor in this case. In these circumstances, I conclude that enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership proceedings.*
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> 175. The Receiver's affidavit evidence outlines the chaotic arbitral processes that would result if this Court were to grant a stay under s. 15 of the Arbitration Act. First, the *Receiver would need to participate in and fund at least four different arbitrations involving "seven different sets of counterparties"* (A.R., vol. XI, at p. 2895). The funding for these proceedings would necessarily come from the estates of Petrowest and the Petrowest Affiliates, to the detriment of their creditors. Second, at least *some of the respondents' claims involve entities not subject to any of the Arbitration Agreements.* As the chambers judge properly recognized, these claims may have to be determined by a court, in parallel with the arbitral proceedings described above. Finally, in the scenario just described, I agree with the Receiver that *"facts and argument would be repeated in different forums, before different decision makers, creating piecemeal decisions and a serious risk of conflicting outcomes"* (R.F., at para. 6).
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> 176. *The inefficient and protracted nature of the contemplated arbitral processes would plainly compromise the integrity of the receivership proceedings.* I acknowledge the chambers judge's finding that arbitration would not "derail" the insolvency proceedings (para. 51). However, this must be read alongside her finding that "the significant cost and delay inherent in the multiple [arbitral] proceedings that would occur in this case as compared to judicial determination is unfair to the creditors and contrary to the objects of the BIA" (para. 60), I agree. (emphasis added)

[25] Finally, and fundamentally, there was an admission by all the parties that proceedings through the courts was a more expeditious option as observed in para. 180 of the judgment.

[26] The fact that the decision in *Peace River* case is not authority for the proposition that upon liquidation, the arbitration agreement becomes immediately inoperative can be clearly seen in the many passages of the Supreme Court of Canada reproduced below where it was careful to confine its findings to the special and unique facts and circumstances of the case as follows:

> 6. ... *Permitting a court-appointed receiver to avoid arbitration on the basis that it is not a party to the debtor's pre-existing agreement to arbitrate is inconsistent with a proper reading of s. 15, ordinary principles of contract law, party autonomy, and this Court's long standing jurisprudence with respect to arbitration.* Nor can disclaimer or the doctrine of separability permit receivers to unilaterally render otherwise valid arbitration agreements "inoperative" or "incapable of being performed" within the meaning of s. 15. Only a court can make a finding that an arbitration agreement is inoperative or incapable of being performed.
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> 8. *To be clear, the fact that a party has entered receivership or insolvency proceedings or is financially impecunious is not, on its own, a sufficient basis for a court to find an arbitration agreement inoperative.*
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> 10. *I stress that this result is context-specific. The unique facts of this case, which pit the public policy objectives underlying the BIA against freedom of contract and party autonomy, justify departing from the legislative and judicial preference for holding parties to their arbitration agreements.* Contrary to conventional wisdom, however, arbitration law and insolvency law need not always exist at "polar extremes". They have much in common, including an emphasis on efficiency and expediency, procedural flexibility, and expert decision-making. These shared interests often converge through arbitration, such that *granting a stay in favour of arbitration will promote the objectives of both provincial arbitration legislation and federal insolvency legislation. It is for this reason that courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent. To do otherwise would not only threaten the important public policy served by enforcing arbitration agreements and thus Canada's position as a leader in commercial arbitration,* but also jeopardize the public interest in the expeditious, efficient, and economical clean-up of the aftermath of a financial collapse.
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> 72. In many cases, the shared interests in expediency, procedural flexibility, and specialised expertise will converge through arbitration. In such a scenario, *the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings.* In other words, the court

A should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve … (emphasis added)

[27] Unlike *Peace River* (*supra*), the present case is a single dispute over what the contractor said is payment due to it under some certifications. As the B termination was due to the liquidation under the PAM Contract, the employer arguably would contend that payment is not required to be made until the project is completed by the rescue contractor for then the employer would be able to ascertain the damages it suffers because of the additional costs incurred in completing what was not completed by the contractor and C also delay and defect rectification costs if any. See cl. 25.4(d) of the PAM Contract, which reads:

25.4 In the event that the employment of the Contractor is determined under Clause 25.1 or 25.3 [on account of the Contractor's insolvency], the following shall be the respective rights and duties of the Employer and D Contractor:

…

25.4(d) the Contractor shall allow or pay to the Employer all cost incurred to complete the Works including all loss and/or expense suffered by the Employer. Until after the completion of the Works under Clause 25.4(a), E *the Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined.* Upon completion of the Works, an account taking into consideration the value of works carried out by the Contractor and all cost incurred by the Employer to complete the Works including loss and/or expense suffered F by the Employer shall be incorporated in a final account prepared in accordance with Clause 25.6. (emphasis added)

[28] Whilst it is true that the liquidator was not a party to the arbitration agreement, yet when he commences any action on behalf of the contractor in liquidation, he steps into the shoes of the company in liquidation and is G bound by the terms of the PAM Contract including the arbitration agreement unless the liquidator applies to the court to disclaim from being bound by those terms.

[29] Again, *Peace River* was careful to explain this in the passage below:

H 109. … Indeed, *a court-appointed receiver, by initiating legal proceedings on behalf of a debtor, "steps into the shoes" of the debtor as the original contracting party, much like an assignee or a trustee in bankruptcy does.* While a court-appointed receiver may have the power to sue on the debtor's behalf, "the receiver acquires no cause of action in its own name" and therefore "must … sue in the debtor's name to recover accounts receivable" (*Bennett*, at p. 257). I In short, a courtappointed receiver has no independent causes of action to assert. It may only rely on the debtor's rights to recover, for example,

accounts receivable owed by a third party. *It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor's behalf while avoiding the debtor's burdens, including the obligation to arbitrate contractual disputes.* (emphasis added)

[30] Such a dispute remains very much resolvable through arbitration as the parties had agreed to this mode of resolving their disputes with the advantages of party autonomy, confidentiality, speed and finality. The court should not rewrite the arbitration agreement for the parties when they had freely and voluntarily agreed to it when they entered into an industry-based standard-form contract in the PAM Contract.

[31] As the arbitration is under the auspices of PAM, the arbitrator chosen would at least have the basic requirements of familiarity with the PAM Contract and the rough and tumble of the construction works either with respect to the rights and obligations of the contractor or employer, both during the employment of the contractor and the termination of the employment.

[32] Even the learned authors, MJ Mustill and SC Boyd, in their seminal text *The Law and Practice of Commercial Arbitration in England*, 2nd edn, Butterworths, (1989) were not prepared to say that an arbitration agreement becomes inoperative upon the winding-up of a party to the agreement. Instead, they were careful to state as follows at p. 153:

7 Winding-up

The winding-up of a company does not discharge an arbitration agreement to which it is a party, nor revoke the authority of an arbitrator appointed by it, unless and until the agreement is disclaimed by the liquidator with leave of the Court.

[33] Reference was made by the learned authors to the then s. 618 of the Companies Act 1985 of the UK. Our Companies Act 2016 has a similar provision in s. 531 under disclaimer of onerous property and "property" includes under s. 531(1)(c) any unprofitable contracts. However, here, the liquidator is suing under the PAM Contract for work done and in so doing would have to meet any defence of set-off from the employer or even a counterclaim that is commenced with leave of court against the contractor in liquidation.

[34] As the PAM Contract here had been terminated by the event of liquidation of the contractor, there is no obligation of the parties that would need to be rescinded by an application to the court. Even if one considers the arbitration agreement as a burden to be disclaimed, that would have to be by way of a separate leave application to the court. The employer, by its s. 10 of the AA 2005 application, is certainly not exercising its right under s. 531(6) of the Companies Act 2016 which reads:

A (6) The Court may, on the application of a person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to the payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to that person may be proved B by him as a debt in the winding up.

[35] The arbitration agreement survives the liquidation of the company that is a party to the agreement under the doctrine of separability, which is housed in s. 18(1) and (2) of our AA 2005, which reads:

C **Competence of arbitral tribunal to rule on its jurisdiction**

18. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the **existence** or **validity of the arbitration agreement.**

(2) For the purposes of subsection (1) -

D (a) an arbitration clause which forms part of an agreement **shall be treated as an agreement independent of the other terms of the agreement;** and

(b) a decision by the arbitral tribunal that the agreement is **null and void shall not *ipso jure* entail the invalidity of the arbitration** E **clause.** (emphasis added)

[36] Our s. 18 is an adoption of art. 16 of the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. Part Two of the explanatory note by the UNCITRAL Secretariat has this helpful information on its art. 16 on which our s. 18 of the AA 2005 is copied from F or modelled after:

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16(1) adopts the two important (not yet generally recognized) G principles of *"Kompetenz-Kompetenz"* and of separability or autonomy of the arbitration clause. *"Kompetenz-Kompetenz"* means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. *Separability means that an arbitration clause shall be treated as an agreement independent of the* H *other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.* Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time. (emphasis added)

I

[37] We do not read cl. 25.3 of the PAM Contract as saying that upon the contractor becoming insolvent or be wound up, the arbitration agreement becomes inoperative. It is the employment of the contractor that "shall forthwith automatically determined (*sic*)" and even if the substantive contract has been terminated, there are rights and obligations that are preserved upon termination for how else would a contractor claim for work done and seek a release of retention sum and correspondingly an employer claim for damages for failure to complete the project and for LAD or defects in the work done.

[38] Clause 25.3, titled "Contractor's Insolvency", reads as follows:

> **In the event of the Contractor becoming insolvent** or making a composition or arrangement with his creditors, or **have a winding up order made,** or (except for purposes of reconstruction or amalgamation) a resolution for voluntary winding up, or having a liquidator or receiver or manager of his business or undertaking duly appointed, or having possession taken by or on behalf of the holders of any debentures secured by a floating charge, or of any property comprised in or subject to the floating charge, **the employment of the Contractor shall forthwith automatically determined (*sic*).** (emphasis added)

[39] In *Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd* [2014] 4 CLJ 895; [2014] 10 MLJ 633, Mary Lim J (later FCJ) held that for an arbitration agreement to be inoperative or incapable of being performed, those constraints must relate to the arbitration agreement itself. Her Ladyship made reference to the British Columbia Court of Appeal's decision in *Prince George (City) v. McElhanney Engineering Services Ltd* [1995] CLJ No. 1474, which again cited MJ Mustill & SC Boyd, *The Law and Practice of Commercial Arbitration in England,* 2nd edn, London, Butterworths, (1989) at pp. 464 to 465, where the learned authors said:

> The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void *ab initio*, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be "inoperative". *First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise. Second, as is discussed in Chapter 32, there may be circumstances in which an arbitration agreement might become "inoperative" by virtue of common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties.* But the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by the arbitration agreement does not make the agreement "inoperative". (emphasis added)

[40] We are not prepared in the circumstances of this case to say that the arbitration agreement has become "inoperative" upon the contractor going into liquidation on the grounds that the fees for arbitration would be beyond the reach of the contractor in liquidation or that there would be unnecessary delay caused by the matter going forward to arbitration. With the bottleneck of cases traceable to the pandemic days, proceedings in the courts are not necessarily faster than in arbitration. Whilst arbitral awards are final (save for the limited grounds for setting aside), judgments of the court are subject to often a few tiers of appeal.

Whether The Insolvency Regime Takes Precedence Over The Arbitration Agreement Such That All Disputes Must Now Be Resolved In The Courts And More So When There Is Allegedly No Dispute On The Debt Claimed By The Contractor In Liquidation

[41] The insolvency regime operates on a different plane when compared to a claim for an amount due for breach of contract *via* litigation or arbitration. There is no need and indeed no basis to pit one against the other. The question of which would trump the other or take precedence and priority over the other does not arise. In fact, an insolvency or winding-up petition is not a "matter" within the meaning of "matter" in s. 10(1) of the AA 2005, where reference is made to: "A court before which proceedings are brought in respect of a **matter** which is the subject of an **arbitration agreement shall,** where a party makes an application before taking any other steps in the proceedings, **stay those proceedings** …" (emphasis added)

[42] Thus, the issue raised in a winding-up petition is whether a sum claimed for example by the contractor is a sum that is not *bona fide* or genuinely disputed and on substantial ground. If the winding-up court so finds and if the employer company has not rebutted the presumption of inability to pay its debts, then a winding-up order would be made.

[43] The winding-up court does not, in a case where the debt claimed is *bona fide* being disputed and on substantial ground, then proceed to decide on whether there is any debt owing to the contractor and if so how much. That is a "matter which is the subject of an arbitration agreement" within the meaning of s. 10(1) of the AA 2005.

[44] The Privy Council, in an appeal from the Cayman Islands on a provision similar to our s. 10 of the AA 2005 in s. 18 of their Arbitration Act in *FamilyMart China Holding Co Ltd v. Ting Chuan Holding Corporation* [2023] UKPC 33; [2024] Bus LR 190 ("*FamilyMart*") held at para. 61 that a "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the 'matter' is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought.

[45] Thus, in *FamilyMart* (*supra*), the Privy Council held that a creditor's winding-up petition is not an "action" within the meaning of s. 18 of the Arbitration Act of the Cayman Islands (or a "claim" within the meaning of s. 9 of the Arbitration Act 1996 of the UK), which is equivalent to s. 10 of our AA 2005. The mandatory stay provisions do not therefore apply to the liquidation application as in a creditor's petition and in fact a creditor's petition is more in the nature of a class action where any creditor may join in to support the petition and these creditors may not have an arbitration agreement with the respondent company to be wound up.

[46] However, the present case is not even a case where "the matter forming the subject of an arbitration agreement" is raised in the context of a petition by the contractor to wind up the employer company. It is quite removed and remote from that where there may be some direct nexus as to whether to stay the winding-up petition. The present case is one where the contractor had already been wound up by another creditor and it is now, through its liquidator, bringing a claim for what it alleged to be payments due to it from work done by it for the employer.

[47] It is thus no different from a case where the contractor in liquidation brings a claim against its employer and where there is no arbitration agreement, no one would bat an eyelid that the liquidator is at liberty to pursue such a claim if it is in the interest of the contractor and its creditors to so do. All that we are saying is that if there is an arbitration agreement, then we cannot ignore its terms and that would include the terms of the arbitration agreement which survives the termination of the PAM Contract.

[48] It is thus not a question of whether because of the liquidation of a party to an arbitration agreement, a new paradigm has set in to render "inoperative" the arbitration agreement. The mandatory language of our s. 10 of the AA 2005 is such that the court cannot disregard the terms of the arbitration agreement just because one of the parties to it is in liquidation. The fact that the debt is not admitted is sufficient for it to come within the meaning of a "matter which is the subject of an arbitration agreement" for reference to arbitration.

[49] Learned counsel for the contractor argued that there is no serious dispute on the debt, which had arisen in the context of interim payment claims duly certified and so even if there is a set-off or counterclaim, that does not prevent the court from entering a judgment on a claim pursuant to a summary judgment application and stay the judgment pending disposal of the counterclaim.

[50] First, there has been a discernible paradigm shift in the court giving deference to arbitration in that the discretionary "may" found in the old s. 6 of the Arbitration Act 1952 ("AA 1952") had given way to the mandatory "shall" in s. 10(1) of the AA 2005. The Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417 explained the change as follows:

[31] Prior to the 2005 Act, the applicable law was the Arbitration Act 1952 ('the 1952 Act'). The issue of stay of proceedings in the 1952 Act was dealt with under s. 6 thereof which reads:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, **apply to the court to stay the proceedings, and the court,** if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, **may make an order staying the proceedings.**

[32] The clear effect of the present s. 10(1) of the 2005 Act is to render a stay **mandatory** if the court finds that all the relevant requirements have been fulfilled; **while under s. 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.** (emphasis added)

[51] See also the cases of *Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd* [2014] 4 CLJ 895; [2014] 10 MLJ 633 at p. 643; *CMS Energy Sdn Bhd v. Poscon Corp* [2008] CLJU 543; [2008] 1 LNS 543; [2008] 6 MLJ 561 at p. 569 and *Rightmove Sdn Bhd v. YWP Construction Sdn Bhd & Anor* [2014] CLJU 233; [2014] 1 LNS 233; [2015] 7 MLJ 687 at p. 693.

[52] Secondly, there was also a further amendment made to s. 10 of the AA 2005 such that whilst previously the court has to determine if there was a genuine dispute to be referred to arbitration, now the test is just whether or not there is a matter within the scope of the arbitration agreement that is to be referred to arbitration.

[53] When the AA 2005 was introduced to repeal the AA 1952, the new s. 10, when first introduced, had a reference to s. 10(1)(b), which had since been repealed by the Arbitration (Amendment) Act 2011 as was highlighted by the Federal Court in *Press Metal Sarawak Sdn Bhd* (*supra*) as follows:

[28] The present s. 10(1) of the 2005 Act (as amended *vide* Act A1395 which came into force on 1 July 2011 (the 2011 Amendment)) reads:

> 10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[29] Prior to the 2011 Amendment, s. 10(1) provided as follows:

10. Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds –

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) *that there is in fact no dispute* between the parties with regard to the matters to be referred.

[30] Paragraph (b) of s. 10(1) was completely repealed by the 2011 Amendment. *Previously, there must be in existence a dispute between the parties with regard to the matter to be referred,* before a court is empowered to make an order under s. 10(1). With the deletion of para (b) the only remaining exception under the present s. 10(1) is that the arbitration agreement between the parties is null and void, inoperative or incapable of being performed.

...

[33] What the court needs to consider in determining whether to grant a stay order under the present s. 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. *The court is no longer required to delve into the details of the dispute or difference (*see *TNB Fuel Services Sdn Bhd).* In fact, *the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). It is an issue to be decided by the arbitral tribunal.* (emphasis added)

[54] There is therefore no need to delve into the matter to determine if there is a genuine dispute to be referred to arbitration. The significant shift was expressed in *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993; [2012] MLJU 839 as follows:

16. It is also evident with the amendment that it is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is, in the words of the statute, 'null and void, inoperative or incapable of being performed'.

17. It is no longer possible to argue that in respect of the controversy between the parties there is no 'dispute' with regard to the matter to be referred to arbitration, which is a test which invites unnecessary ambiguity and requires the court to determine whether there is a 'dispute' between the parties not dissimilar to the function performed by the court in determining whether there is a triable issue in a summary judgment application. *The test is now simpler test of whether the matter before the court is the subject of an arbitration agreement or otherwise. To decide on the simpler test, if will become a matter of construction of the relevant arbitration agreement, where it exists.* (emphasis added)

[55] Subsequent cases from the apex have reiterated that the presence of a dispute is no longer a condition precedent for a stay of court proceedings under s. 10 of the AA 2005. The Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693 at paras. [108] and [109] underscored the position that the Arbitration (Amendment) Act 2011 is to render a stay mandatory when an action is filed in court in breach of the arbitration agreement.

[56] The Federal Court in *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 4 CLJ 301 further reminded us of the position of the law that there is no longer a requirement of a dispute between the parties before the stay of the court proceedings is made in favour of the matter proceeding to arbitration as follows at:

> [53] (a) … The position stated above is therefore trite, namely that the court is not to enquire or investigate whether there subsists a dispute warranting referral to arbitration. That is a matter for the consideration and determination of the arbitral tribunal.

[57] The High Court erred in relying on the Court of Appeal case of *Celcom (Malaysia) Sdn Bhd v. Sarawak Electricity Supply Corporation* [2003] 1 CLJ 6 ("*Celcom*") in coming to the conclusion that the employer failed to show the existence of a dispute. A closer and careful scrutiny would show that the case was decided based on s. 6 of the AA 1952, which had been repealed. Likewise, the High Court's reliance on *Che Group Bhd v. Dato Kweh Team Aik* [2019] CLJU 1292; [2019] 1 LNS 1292, which followed the *Celcom*'s case (*supra*) is similarly misplaced.

[58] It may be argued that if there is no dispute, then why waste further sums of money for the payment of the arbitrator's fees and expenses and the answer to that is the creditor is not precluded from proceeding with a winding-up petition or action if it is confident that there is no genuine dispute on the debt on substantial ground. See the recent Privy Council case from the British Virgin Islands ("BVI") of *Sian Participation Corp (In Liquidation) (Appellant) v. Halimeda International Ltd (Respondent) (Virgin Islands)* [2024] UKPC 16 ("*Sian Participation Corp*"), where the Privy Council held that as a matter of BVI law, the correct test for the court to apply to the exercise of its discretion of whether to make an order for the liquidation of a company, where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. The debt arose out of default by the appellant of a banking facility agreement. As the correct test had been applied by the judge of the first instance and the Court of Appeal, the Privy Council advised His Majesty that the appeal be dismissed.

[59] Our experience in transitioning from the need to show that there is a genuine dispute to that of a consideration as to whether the matter to be decided is covered by the arbitration agreement before a court stays the proceeding before it in favour of arbitration was also the earlier experience of the UK courts with the introduction of their Arbitration Act 1996. A summarised sketch of the shift was captured by the Privy Council in *Sian Participation Corp* (*supra*) as follows:

> 63. Unless an arbitration agreement provides otherwise, it is not the policy of the Arbitration Act, or its English equivalent, to require a creditor to obtain an arbitration award before enforcing a debt which is completely undisputed, by a claim in court. Nonetheless *the English courts have set a very low threshold for the identification of a dispute sufficient to require arbitration, and therefore a mandatory stay of any claim in court to enforce the debt, under section 9 of the 1996 Act. All that is necessary is that the debt should not be admitted. It need not be denied, nor need any, let alone any substantial, grounds to be shown for disputing the debt:* see *Halki Shipping Corpn v. Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki Shipping*"). The judgments of Henry LJ at p 750 and Swinton Thomas LJ at pp 762-763 explain that this low threshold was introduced in the 1996 Act on the deliberate policy ground of preventing the avoidance of a mandatory stay by the creditor seeking summary judgment in court proceedings to enforce the debt, on the assertion that there was no sufficient dispute of substance to require a trial (or therefore an arbitration). *Since 1930, the predecessors to the 1996 Act had permitted this to happen because the predecessor to section 9 had included as a ground for resisting a stay the assertion that "there is not in fact any dispute between the parties with regard to the matter agreed to be referred".* Thus, a creditor could resist a mandatory stay on a basis very similar to that used to resist the dismissal of a winding up petition on the grounds that the debt was disputed, *ie*, by showing that the debt was not genuinely disputed on substantial grounds. This was removed from what became section 9 in 1996. It was to take until 2013 (in *Rusant Ltd v. Traxys Far East Ltd* [2013] EWHC 4083 (Comm) ("*Rusant*")) for the possible implications of this change in the threshold for a mandatory stay to seep through to the context of winding up. (emphasis added)

[60] Liquidation does not change the mode of resolving a dispute, whether it is *via* a pre-agreed arbitration or absent that, litigation in court. Neither is liquidation opposed to arbitration for arbitration is nothing more than a way of determining if liability is established arising from a matter the subject of the arbitration agreement and if so what is the quantum when damages are being assessed. The Privy Council in *Sian Participation Corp* (*supra*) has helpfully explained the two concepts of liquidation and arbitration as follows:

> 90. Nor are the policies underlying the arbitration legislation which implement the Model Law in any way offended or infringed by a party to an arbitration agreement seeking the liquidation of a debtor party which fails to pay the debt. There is a policy of insolvency legislation that the

liquidation route should not be pursued, or even threatened, against a company which genuinely disputes the debt on substantial grounds. *Where there is such a dispute, the policy is that the creditor should first establish his claim, by having that dispute resolved in its favour, either by a judgment in court or, if there is an applicable arbitration agreement, by an arbitral award.*

91. *The clearest legislative signal about the boundary of the policy that a party to an arbitration agreement should arbitrate is the extent of the mandatory stay provision which implements article 8 of the Model Law. That identifies the extent of the negative obligation: not to seek resolution of a dispute in court.* A winding up petition or similar application lies outside both that boundary and therefore the extent of the underlying policy.

92. None of the general objectives of arbitration legislation (efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose. Party autonomy and *pacta sunt servanda* are not offended because seeking a liquidation is not something which the creditor has promised not to do. And by ordering a liquidation the court is not resolving anything about the debt, nor interfering with the resolution of any dispute about it.

93. Above all there is nothing anti-arbitration in this conclusion. In most agreements where one party is likely to be the creditor, (such as any typical loan agreement), it is that party which will generally have the whip-hand in choosing or vetoing the detailed terms of the agreement. Such a party is much more likely to agree to include an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt. *And where there is such a dispute, then arbitration will prevail as the means of resolution.* (emphasis added)

[61] We are fully conscious of the fact that in the present case, the contractor is already in liquidation and not a case where it is seeking to wind up the employer for what it perceives to be a debt not disputed on substantial grounds for work done. However, the principle of the court granting a stay of its proceedings in favour of arbitration applies equally across the board, even when the claimant is already in liquidation and is claiming a disputed debt in litigation and not arbitration. Its liquidation has not changed an iota its initial agreement to arbitrate.

[62] Strictly speaking, there is nothing preventing the contractor in liquidation to present a winding-up petition against its employer if it is confident that the debt cannot be genuinely disputed on substantial ground. However, the contractor may be estopped from so proceeding as it had proceeded with a court action only to be met with an application for stay of that court action.

[63] What has changed is that leave of the court would be required for the employer to proceed with a counterclaim against its contractor. In *UDA Land Sdn Bhd v. Puncak Sepakat Sdn Bhd* [2020] CLJU 877; [2020] 1 LNS 877; [2020] MLJU 892, ("*UDA Land*") it was observed in para. [20] that the "… plaintiff obtained leave from the winding up court to counterclaim against the defendant in the arbitration proceedings," presumably under the then s. 226(3) of the Companies Act 1965. The equivalent provision under s. 471(1) and (2) of the Companies Act 2016 is as follows:

> **Action or proceeding stayed after winding up order**
>
> 471. (1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.
>
> (2) The application for leave under subsection (1) shall be made in the Court granting the winding up order and shall be served on the liquidator.

[64] The employer may also be minded to ask for security for costs for the arbitration.

Whether There Are Issues Pending Which Require Resolution By An Insolvency Court ("Insolvency Issues") As These Are Non-arbitrable

[65] The AA 2005 in s. 4 recognises that there are certain subject matters that are not arbitrable under the law or which arbitration agreement would be contrary to public policy. Some of these matters are those with respect to the grant of a dissolution of marriage, orders with respect to adoption, judicial review matters involving *certiorari* and *mandamus*, contempt of court, registration and expunging of patent and other intellectual property rights, order for sale under the National Land Code, issues arising out of liquidation, judicial management or receivership under the Companies Act 2016, to mention but a few.

[66] Thus, matters with respect to an order for sale would have to be canvassed in the court, though the security over land could be part of a facility agreement where there is an arbitration clause as was held in *Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd* [2019] 1 CLJ 305; [2018] MLJU 2117.

[67] The Singapore Court of Appeal's decision in *Larsen Oil & Gas Pte Ltd v. Petroprod Ltd* [2011] SGCA 21 can be distinguished from the present case as there, the liquidator sought the avoidance of payment it had made to the appellant on the grounds that these payments amounted to unfair preferences or transaction at an undervalue within the meaning of their Bankruptcy Act read with their Companies Act. The court held that the claim was non-arbitrable as the disputes were arising from the operation of statutory provisions of the insolvency regime *per se*.

[68] Our present dispute is one arising pre-insolvency and not an insolvency dispute, which requires the court's determination under the Companies Act 2016, where Parliament had carved out these issues from arbitration and made it non-arbitrable as a matter of public policy. See also the case of *Tomolugen Holdings Ltd And Another v. Silica Investors Ltd And Other Appeals* [2015] SGCA 57.

[69] Our s. 4 of the AA 2005 reads as follows:

> **Arbitrability of subject matter**
>
> 4. (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration *unless the arbitration agreement is contrary to public policy or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.*
>
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration. (emphasis added)

[70] The parties are still at the very preliminary stage of the contractor having filed its claim in court and the employer, upon entering appearance, had applied for a stay of the court proceedings on the grounds of a valid arbitration agreement which is not null and void, inoperative or incapable of performance. In brief, both parties are at the stage of setting forth their claims against each other. The issue is purely on whether there are monies owing by the employer to the contractor under the PAM Contract and it so, what is the amount.

[71] As and when the claim is brought, the employer may raise the defence of set-off and a counterclaim with respect to the delay and defects if any and the amount of the LAD claim as well as damages for the contractor's failure to complete the works under the PAM Contract as a result of a determination of its employment due to its insolvency. These are not issues peculiarly within the province of a winding-up court but rather issues for the arbitral tribunal to decide and if there is no arbitration agreement, then it would be the civil courts that would hear and decide the matter.

[72] There are no issues that have encroached onto the winding-up court for its decision, be it the issue of whether if a set-off is raised by the employer, should it be allowed to reduce the contractor's claim accordingly or whether the amount owing by the contractor to the employer should be treated as unsecured and falling into the general pool of unsecured creditors to be distributed *pari passu*.

[73] As and when these issues have to be decided, the arbitral tribunal should be able to decide as matters falling within the terms of reference to arbitration as was so decided by the arbitrator in *UDA Land* case (*supra*).

[74] This is not a matter where the issue is purely within the purview of the winding-up court as in involving other creditors that do not have an arbitration agreement with the employer. Neither is it a matter that is not arbitrable as in whether for example Goods and Services Tax ("GST") collected or amount owing by the contractor to the Royal Malaysian Customs would be treated as preferential debt or dispute on *pari passu* ranking of debts or whether certain sums of monies are held in trust.

[75] Some of the matters that would of necessity have to be decided by a winding-up court would be matters falling within Part 1 and Part II of the Twelfth Schedule to the Companies Act 2016 referred to in s. 486 of the Act as follows:

> **Powers of liquidator in winding up by Court**
>
> 486. (1) Where a company is being wound up by the Court, the liquidator may -
>
> (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and
>
> (b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part Il of the Twelfth Schedule.
>
> (2) *The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.* (emphasis added)

[76] There is also the general provision in s. 517 of the Companies Act 2016 for an application to the winding-up court with respect to challenging the decision of a liquidator as follows:

> **Appeal against decision of liquidator**
>
> 517. Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

Whether In Spite Of The Arbitration Agreement The Court May Have Regard To Prohibitive Costs Of Arbitration In Refusing A Stay Under Section 10 Of The AA When The Party Suing Is In Liquidation

[77] Learned counsel for the contractor did a tabulation of the initial costs of arbitration as opposed to the costs of litigation. Whilst the initial costs may appear higher, it must not be forgotten that there is still the element of legal fees and disbursements not costed in. Parties can always explore with the arbitrator to be appointed by PAM, if parties cannot agree on the arbitrator to be appointed, on chess clock arbitration or documents-only arbitration so as to reduce costs.

[78] Where funding of the arbitration is concerned, there is no averment as to whether the contributories of the contractor had been consulted with respect to a possible advance of the funding from third parties, which, of course, would be a decision to be made against the concomitant risks of proving the claim as weighed perhaps against a counterclaim by the employer which may or may not exceed the contractor's claim.

[79] It is not enough for the liquidator to say that the arbitration process would be slow and expensive, draining away the limited fund and/or assets of the company and holding up distributions to creditors in the liquidation proceedings which would compromise the orderly and efficiency of the liquidation process and/or insolvency regime.

[80] The PAM Contract with its arbitration clause has been around for quite a while and no parties can claim that they were unaware of the costs of arbitration. The benefits of party autonomy, confidentiality, speed and finality would be what parties generally subscribe to when they agree to arbitrate rather than litigate.

[81] The primacy that courts would give to upholding freedom of contract and to lean in favour of non-interference in arbitration matters consistent with our s. 8 of the AA 2005 is captured in the following passage of the *Peace River* case (*supra*) by the Supreme Court of Canada as follows:

> 139. *Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties.* The cases interpreting s. 15(2) of the Arbitration Act make it clear *that matters such as inconvenience, multiple parties, intertwining of issues with non-arbitrable disputes, possible increased cost, and potential delay generally will not, standing alone, be grounds to find an arbitration agreement inoperative* (Prince George, at para. 37; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 BLR (3d) 291, at para. 34). Indeed, like all the statutory exceptions, the exception for an inoperative arbitration agreement is to be narrowly interpreted, with the party seeking to avoid arbitration bearing the heavy onus of showing that it applies. This serves "the interests of freedom of contract, international comity and expected efficiency and cost-savings" from enforcing otherwise valid arbitration agreements (*McEwan and Herbst*, at s. 3:57; *MacKinnon*, at para. 36). (emphasis added)

[82] The contractor's argument is by no means novel as the Federal Court in *Press Metal Sarawak* (*supra*) had addressed this as follows:

> [104] … In our view the issue of **time, costs and expenses should not be cited to refuse a stay application.** This was affirmed by the English Court of Appeal in *Smith v. Pearl Assurance Co Ltd* [1939] 1 All ER 95, to the effect that the expense or arbitration proceedings is an insufficient grounds for refusing a stay. (emphasis added)

[83] The court cannot rewrite the terms of the contract in the arbitration agreement for the parties. In fact, the court cannot intervene in matters covered by an arbitration agreement unless expressly provided for under the AA 2005. Section 8 has this curial hands-off approach to arbitration as follows:

> **Extent of court intervention**
>
> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

Decision

[84] For the reasons given above, we are of the considered view that the arbitration agreement in the PAM Contract does not automatically become "inoperative" upon the contractor here going into liquidation. In the circumstances of this case, the debt claimed is disputed and the conduct of the liquidator all point to the fact that the arbitration agreement is very much enforceable as the liquidator has not applied to the court for any of the contractor's rights, obligations or burdens to be disclaimed.

[85] The doctrine of separability applies and the arbitration agreement is very much alive and applicable. The dispute is a contractual dispute which is arbitrable and not an insolvency dispute of the kind which is not arbitrable and which is within the distinct domain of the winding-up court.

[86] We are not persuaded that the arbitration agreement has become inoperative both under the law and in the circumstances of this case. The court would lean on upholding the bargain of the parties, especially in the arbitration agreement, which is part of an industry-based standard form contract in the PAM Contract.

[87] We had therefore allowed the appeal, set aside the order of the High Court and granted an order to stay the court proceedings and to refer the matter to arbitration as per the arbitration agreement in the PAM Contract. We allowed costs of RM10,000 to the appellant subject to allocatur.